

Journal of Legislation

Volume 20 | Issue 2

Article 5

5-1-1994

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Recommended Citation

Heglin, Robert (1994) "Flurry of Recidivist Legislation Means: Three Strikes and You're Out, A;Note," *Journal of Legislation*: Vol. 20: Iss. 2, Article 5.

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NOTES

A FLURRY OF RECIDIVIST LEGISLATION MEANS: "THREE STRIKES AND YOU'RE OUT"

The *stories*: "NYC Police Department reports rise in youths arrested for murder from 16.4% to 24.2% in the last three years; 904 persons murdered . . .",¹ "NYC Transit, citing 'drastic' rise in crimes on buses, begins campaign to add 1500 patrol and 100 radio patrol . . . cites 'rampant' assaults on riders; says robberies of drivers have doubled . . .",² and the *headlines*: "New Epidemic of Crime - The Causes and the Cures",³ "Every Type of Serious Crime is on the Rise"⁴ paint a familiar picture. However, these quotes weren't recent; they were gleaned from some 1969 *New York Times* stories and some 1975 *U.S. News and World Report* headlines. Such news has been a daily fact of life in these United States for over the past two decades. During this time period the crime rate has fluctuated, but generally the crime rate for the early 1990s is not much different than it was during the early 1970s.⁵ Nonetheless, the clamor from the public for political leaders to "do something" has reached a fever pitch here in 1994,⁶ and the politicians have responded in true Pavlovian fashion.

Thus far, the result of political scurrying has meant the Senate passage of a broad crime package⁷ and many proposed crime measures from the House of Representatives.⁸ Even President Clinton has responded with tough rhetoric on the crime issue. Throughout this flurry of activity many issues and proposals have been bandied about such as more funding for innovative drug treatment,⁹ more funding for commu-

1. The New York Times Company: Abstracts, N.Y. TIMES, June 25, 1969, at 33.

2. The New York Times Company: Abstracts, N.Y. TIMES, Jan. 5, 1969, at 48.

3. *New Epidemic of Crime - The Causes and the Cures*, U.S. NEWS & WORLD REP., Apr. 7, 1975, at 31.

4. *Every Type of Serious Crime is on the Rise*, U.S. NEWS & WORLD REP., Apr. 7, 1975, at 33.

5. See BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, HIGHLIGHTS FROM 20 YEARS OF SURVEYING CRIME VICTIMS, THE NATIONAL CRIME VICTIMIZATION SURVEY, 1973-92 7 (1993); George F. Cole, *Measuring Things; Making Sense of U.S. Crime Statistics*, THE PUBLIC PERSPECTIVE, Mar. & Apr., 1993, at 19, 20. Figures from the FBI Uniform Crime Report (UCR) show violent crime up about 30% from 1981-91, while property crime has held steady. Over the past twenty years the UCR shows a rise in violent crime during the 1970s that leveled off through the mid 1980s and then began rising through to the present, while property crime rose during the 1970s and has remained steady ever since. However, in sharp contrast to the FBI numbers are the figures from the National Crime Victimization Survey (NCVS) which show that current violent crime levels are down slightly from 1973 levels and property crime levels are drastically down from 1973 levels. One explanation posited for this disparity is the fact that FBI figures only include *reported* crime, thus an increase in the report of crimes (but not necessarily an increase in crime itself) will show a false increase in crime.

6. E.g., CNN & Company (CNN television broadcast, Jan. 25, 1994) (transcript #279). The CNN/USA Today gallup poll shows crime as the nation's leading concern.

7. H.R. 3355, 103d Cong., 1st Sess. (1993).

8. H.R. 2872, 103d Cong., 1st Sess. (1993); H.R. 3315, 103d Cong., 1st Sess. (1993); H.R. 3351, 103d Cong., 1st Sess. (1993); H.R. 3557, 103d Cong., 1st Sess. (1993).

9. H.R. 3355, 103d Cong., 1st Sess. § 1535 (1993).

nity oriented policing¹⁰ and additional offenses worthy of capital punishment.¹¹ However, one particular issue seems to have sparked more debate, more applause¹² and more critics¹³ than any other proposal. This issue is the so called "three strikes and you're out" (the "Three Strikes") proposition.

Three Strikes is the popular term used to describe the recidivist legislation that calls for the incarceration of a violent criminal for life upon a third felonious conviction. With such controversy surrounding its efficacy and with such prominence regarding its present debate the time is ripe for an in-depth analysis of the Three Strikes legislation.

This Note examines the Three Strikes legislation through an analysis of previous experience with recidivist statutes throughout the United States coupled with analysis of the various arguments that have been proffered both for and against this issue. This examination will rebut many of the arguments against Three Strikes and present an improved version of Three Strikes law. The structure of the Note will be split into five parts. Part I offers an overview of Three Strikes law with a look at current recidivist statutes throughout the United States. Part I will also advance the various punishment theories justifying these laws and gauge the Supreme Court's reaction to them. Part II examines the arguments in support of Three Strikes law and those opposed to it. Part III summarizes the particular Three Strikes proposals that are currently being debated at the federal level. Part IV provides an improved version of Three Strikes law based upon analysis of the arguments presented in Part II and analysis of the differences in the current federal proposals introduced in Part III. Finally, Part V offers a summary and conclusion.

I. BACKGROUND ON THREE STRIKES LAW

Many theories have surfaced over the years about the most effective ways to curb criminal activity.¹⁴ In popular political terms the theories can be generalized such that the conservative view tends to lean toward stricter rules on incarceration while the liberal perspective leans toward caring more for the socioeconomic causes of crime and implementation of preventative and rehabilitative measures.¹⁵ No matter which ideological bent one sides with it remains a fact that a smaller percentage of criminals perpetrate a much greater percentage of the crimes.¹⁶ For example, a survey done in the city of Philadelphia showed that two thirds of violent crime was committed by seven percent of the criminals.¹⁷ Thus, both the conservative and liberal ideologies should recognize the necessity to focus some effort at controlling this limited group of

10. H.R. 2872, 103d Cong., 2nd Sess. § 1701 (1993).

11. H.R. 2872, 103d Cong., 2nd Sess. §§ 131, 224, 321, 430, 706 (1993).

12. See, e.g., Eric Lichtblau, *Assessing Hits, Errors of '3 Strikes' Crime Bill in O.C.*, L.A. TIMES, Feb. 6, 1994, at 1 (showing poll where 84% of Americans favor "three strikes"); Peter Pringle, *Clinton Crime Bill is a Sham, Say Critics*, THE INDEPENDENT, Mar. 10, 1994, at 14 (showing that over 80% of Americans favor "three strikes" according to polls).

13. See, e.g., Pringle, *supra* note 12 (explaining disfavor of Three Strikes by critics); Gwen Ifill, *Clinton Embraces Crime Measure, Ever So Vaguely*, N.Y. TIMES, Feb. 21, 1994, at 13 (explaining that critics say Three Strikes does little for prevention of crime).

14. See generally HAROLD E. PEPINSKY, CRIME CONTROL STRATEGIES, AN INTRODUCTION TO THE STUDY OF CRIME (1980) (overview of methods to control crime and criminality).

15. See generally KEVIN STINSON & DAVID COWELL, THE POLITICS OF CRIME CONTROL (1991).

16. Cohen, *infra* note 43; *Selective Incapacitation*, *infra* note 43.

17. Mortimer B. Zuckerman, *War on Crime, By the Numbers*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 68, 69.

criminals. Three Strikes law is geared toward more severe punishment for this limited group of criminals: those who have shown the propensity to be involved with a larger percentage of crimes.

Since Three Strikes law is basically a punitive measure, it would seem to be more popular with the conservative thinkers. However, it is important to keep in mind throughout the analysis of this Note that Three Strikes law is only a small weapon in the arsenal against crime. Therefore, one should examine the Three Strikes legislation based on its own merits and understand that should such legislation prove useful in its own right, then one could include it as part of a larger crime initiative satisfying either ideology.

A. Current Three Strikes Law Throughout The Country

Before analyzing the particular legislation as proposed by the President and Congress, it is important to understand that, despite all the renewed debate, similar Three Strikes legislation is the law throughout much of the country, both in various state laws¹⁸ and certain federal laws.¹⁹ For example, Texas has had a Three Strikes law since the early 1970s that puts three-time felons in jail for twenty-five years to life.²⁰ Also, West Virginia has a similar but more stringent version which incarcerates three-time felons for life without the possibility of parole.²¹ Twelve other states have habit-

18. *Infra* note 22. Some of the state laws provide for life imprisonment upon a fourth felonious conviction but will be considered under the veil of Three Strikes law.

19. See 18 U.S.C. § 924 (1994); 21 U.S.C. § 841 (1993).

20. TEX. PENAL CODE ANN. § 12.42 (West 1994). The title of the law is "Penalties for Repeat and Habitual Felony Offenders" and the text is as follows:

(a) If it be shown on the trial of a third-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a first degree felony.

(b) If it be shown on the trial of a second-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a first-degree felony.

(c) If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years. In addition to imprisonment, an individual may be punished by a fine not to exceed \$10,000.

(d) If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 25 years.

21. W. VA. CODE § 61-11-18 (1993). The title of the law is "Punishment for Second or Third Offense of Felony" and the text is as follows:

When any person is convicted of an offense and is subject to confinement in the penitentiary therefore, and it is determined, as provided in section nineteen [§ 61-11-19] of this article, that such person had been before convicted in the United States of a crime punishable by imprisonment in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, five years shall be added to the maximum term of imprisonment otherwise provided for under such sentence.

When it is determined, as provided in section nineteen hereof, that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the penitentiary for life.

ual criminal laws similar to those of Texas and West Virginia,²² and at least twenty-one more states have some type of increased penalty for multiple felons.²³

Even the Federal government makes use of recidivist statutes similar to the proposed Three Strikes legislation. The Armed Career Criminal Act²⁴ provides that if a person uses a firearm during the commission of a violent crime and it is his second conviction under the Act, then the offender is automatically sentenced to prison for twenty years to life depending on the weapon used.²⁵ There also currently exists the Controlled Substances Act²⁶ which provides that a term of life imprisonment without parole shall be imposed after a third enumerated drug related conviction.²⁷ It is obvi-

22. ALA. CODE § 13A-5-9 (1993) (providing for life imprisonment after two previous felonies when the third conviction is for a Class A felony or after three previous felonies when the fourth conviction is for a Class B or Class A felony); COLO. REV. STAT. § 16-13-101 (1993) (Colorado's statute providing for life imprisonment with possibility of parole after forty years upon fourth felonious conviction); DEL. CODE ANN. tit. 11, § 4214 (1993) (providing for life imprisonment after third felonious conviction); 720 ILCS 5/33B-1 (1993) (Illinois' statute providing for life imprisonment upon a third felonious conviction); LA. REV. STAT. ANN. 15:529.1 (West 1992) (providing for life imprisonment after third felonious conviction if previous two felonies were punishable by terms greater than twelve years); MD. ANN. CODE art. 27, § 643B (1993) (providing for twenty-five years imprisonment upon third felonious conviction and life imprisonment upon fourth felonious conviction); MASS. ANN. LAWS ch. 279, § 25 (1993) (providing for life imprisonment upon third felonious conviction); NEV. REV. STAT. ANN. § 207.010 (1993) (providing for life imprisonment with the possibility for parole upon a fourth felonious conviction); S.C. CODE ANN. § 17-25-45 (Law. Co-op. 1991) (providing for life imprisonment without parole upon a third felonious conviction); VT. STAT. ANN., tit. 13, § 11 (1993) (providing for life imprisonment upon a fourth felonious conviction); WASH. REV. CODE 9.92.090 (1994) (providing for life imprisonment upon a third felonious conviction); WYO. STAT. § 6-10-201 (1993) (providing for life imprisonment upon a fourth felonious conviction).

23. The states (including the District of Columbia) are: Arkansas, California (governor just approved Three Strikes on Mar. 6th), Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Minnesota, Montana, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, & Wisconsin.

24. 18 U.S.C. § 924 (1994).

25. *Id.* The relevant section (c)(1) provides:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

26. 21 U.S.C. § 841 (1993).

27. *Id.* The pertinent text under section (b)(1)(A) provides:

If any person commits a violation of this subparagraph or of section 859 [distribution to persons under age twenty-one], 860 [distribution or manufacturing in or near schools or colleges], or 861 [employment of persons under age 18] of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence

ous from this extensive list of current law that the Three Strikes legislation is not a new untested theory. Therefore, the experience gained in the utilization of these laws will help guide the forthcoming analysis of the current proposals.

B. Punishment Theory

The primary purpose of Three Strikes law is to punish. This is obvious, since the law demands incarceration upon a third felony conviction. There has been much written about society's right to punish and what authority grants this right.²⁸ For the purposes of this Note the authority will be presumed, however it is still useful to examine how Three Strikes law conforms to the four primary purposes or effects of punishment: Rehabilitation, Retribution, Deterrence and Incapacitation.²⁹

1. Rehabilitation and Retribution

Rehabilitation as a purpose of punishment presumes the possibility that the criminal can at some time be released into the general public without the threat of renewed criminal activity.³⁰ The very nature of Three Strikes law rebuts this presumption for the narrow band of criminals that are affected by it. Since the affected criminal has already failed to be rehabilitated in relation to his first two felonies, it is doubtful that the reality of increased confinement for the third felony would play any rehabilitative role (especially if the sentence is life in prison without parole). Thus, rehabilitation is generally not an objective of the current Three Strikes legislation.

Retribution focuses on the criminal's act and his moral blameworthiness in relation to the rest of society.³¹ The moral culpability of the criminal requires that punishment be inflicted, because his act was freely chosen in derogation of the society in which he participates.³² The purpose of punishment under the theory of retribution is not meant to improve society, rather it is the "systematic moral response to wrongdoing."³³ Thus, retribution is linked directly to moral culpability.³⁴

It may appear at first glance that one purpose of Three Strikes law is retribution by holding the criminal accountable for his transgression against society. However, Three Strikes law is an enhancement to a criminal's punishment. Since the enhancement of punishment is over and above what was received as retribution for the third conviction, it would seem that retribution is not present in Three Strikes law. Nevertheless, to the extent that the offender may not have served the full extent of his previous sentences one might argue that full retribution was not exacted from the felon, and

28. See, e.g., Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059 (1992); Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299 (1990); Markus Dirk Dubber, Note, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193 (1990).

29. In the writings about punishment the notions of rehabilitation, retribution, deterrence and incapacitation are used either as purposes or effects of punishment. This Note will treat them as purposes rather than effects of punishment.

30. See JEFFREY LEIGH SEDGWICK, *DETERRING CRIMINALS, POLICY MAKING AND THE AMERICAN POLITICAL TRADITION* 36 (1980).

31. Rychlak, *supra* note 28, at 325.

32. *Id.*

33. *Id.* (quoting Lipkin, *The Moral Good Theory of Punishment*, 40 U. FLA. L. REV. 17, 81 (1988)).

34. See *id.*

Three Strikes law makes up for this deficiency.³⁵ In this limited speculative sense Three Strikes law can be viewed as retributive. However, whether or not the criminal gets out early he is generally viewed as "having paid his debt to society" and the retribution fulfilled. Therefore, viewed as an enhancement to a felon's punishment, Three Strikes law must have a purpose other than retribution.

2. Deterrence

The concept of deterrence has been advanced as a primary purpose of punishment under Three Strikes law.³⁶ Deterrence theory can be split into two factions: Individual Deterrence and Societal Deterrence.³⁷ Individual deterrence is the idea that by punishing x for doing y, x will be deterred from doing y in the future. Societal deterrence is the notion that by punishing x for doing y, society will be deterred from doing y.³⁸

By the nature of the proposed Three Strikes legislation one could not argue that individual deterrence is the goal, for the life sentence imposed precludes this. Notwithstanding, one might argue that a substantial purpose of the legislation is societal deterrence, since such a harsh sentence will send a message to others not to do the same. Though this has been a stated purpose of such legislation,³⁹ it has been contended that the real value of deterrence is not from heavy handed punishment (life imprisonment under Three Strikes).⁴⁰ Rather, the greater deterrent effect comes from the likelihood that a perpetrator will be apprehended and convicted.⁴¹ This has nothing to do with Three Strikes law, since the law only deals with punitive measures upon a third conviction and in no way aids in apprehension and conviction. Therefore, deterrence has been a stated goal of Three Strikes law, but it is untenable whether such law fulfills that goal.

3. Incapacitation

The fourth purpose of incarceration as punishment is incapacitation. This theory relies on the simple fact that a criminal behind bars cannot commit crimes out in society.⁴² There is a subset theory of incapacitation known as "selective incapacitation."⁴³ The principle of selective incapacitation is closely related to Three Strikes

35. Crocker, *supra* note 28, at 1097.

36. See, e.g., W. VA. CODE § 61-11-18 (1993). Section IV of the notes following the statute states in part:

Generally - The purpose of this section is to deter a person from future violations. Dye v. Skeen, 135 W. Va. 90, 62 S.E.2d 681, 24 A.L.R. 2d 1234 (1950). The purpose of the habitual criminal statute is to deter a person from future criminal behavior. State v. Pratt, 161 W.Va. 530, 244 S.E.2d 227 (1978); State v. Stover, 368 S.E.2d 308 (W. Va. 1988) Public Policy - The public policy underlying the recidivist or habitual criminal statute is an attempt to deter the commission of offenses in the future. Moore v. Coiner, 303 F. Supp. 185 (N.D.W. Va. 1969).

37. See Rychlak, *supra* note 28, at 308 ("Deterring the offender from repeating the crime is known as specific deterrence, while deterring others is known as general deterrence" (citing J. Kaplan & R. Weisberg, Criminal Law 5-12 (1986)); DAVID P. FARRINGTON ET AL., UNDERSTANDING & CONTROLLING CRIME TOWARD A NEW RESEARCH STRATEGY 135-37 (1986) (discussing "General and Individual Deterrence").

38. Rychlak, *supra* note 28, at 308; FARRINGTON, *supra* note 37, at 135-36.

39. *Supra* note 36.

40. Rychlak, *supra* note 28, at 309.

41. *Id.*

42. *Id.* at 312.

43. Jacqueline Cohen, Symposium, *Prison Crowding: Selective Incapacitation: An Assessment*, 1984

law, for selective incapacitation focuses on the premise that a smaller percentage of criminals account for a much greater percentage of crime.⁴⁴ Selective incapacitation theory posits that the small percentage of recidivists can be singled out from those criminals without recidivist tendencies.⁴⁵ Once this is known the proper incarceration rates can be applied in such a way that the recidivists are taken off the streets for good, and a problem such as prison overcrowding can still be avoided by lighter sentences for those identified as non-recidivists.⁴⁶ The principal drawback of such a plan is determining accurately beforehand who the recidivists will be.⁴⁷ Some studies have shown that factors such as previous felony convictions, which one might think are reliable in determining a recidivist, have not proven reliable.⁴⁸ Other factors used to determine recidivism such as age, race, or sex raise difficult moral and ethical concerns.⁴⁹ The inherent difficulties in executing selective incapacitation means that it has yet to be formally adopted by our legal system. The proposed Three Strikes legislation does not afford the same advantages that selective incapacitation offers regarding identification of non-recidivists and predetermination of recidivists. However, it does further the goal of incapacitation by permanent incarceration of repeat offenders.

Punishment theory rests on the four primary purposes of rehabilitation, retribution, deterrence and incapacitation. From these, the proposed Three Strikes legislation basically incorporates incapacitation and to a limited extent deterrence. In the forthcoming analysis of the arguments supporting and opposing Three Strikes law, the purposes of punishment will be important factors, for the weight one places on the importance of each purpose will be significant in determining the efficacy of the Three Strikes legislation.

C. Constitutionality Of Three Strikes Law

It has been shown that Three Strikes law is not new and that it furthers the punishment goals of incapacitation and arguably deterrence, however, is it constitutional? Does the Eighth Amendment bar against cruel and unusual punishment apply? The case of *Harmelin v. Michigan*⁵⁰ answers these questions.

In *Harmelin*, the defendant, Ronald Harmelin was pulled over for a routine traffic violation, subject to a pat down search where narcotics were discovered, and subsequently arrested.⁵¹ He was convicted of possession of 650 or more grams of cocaine and sentenced to life imprisonment without possibility of parole.⁵² The defendant claimed that the disproportionate severity of the punishment imposed was unconstitu-

U. ILL. L. REV. 253 (1984); Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511 (1982) [hereinafter *Selective Incapacitation*]; FARRINGTON, *supra* note 37, at 137.

44. Cohen, *supra* note 43 at 254; *Selective Incapacitation*, *supra* note 43.

45. Cohen, *supra* note 43.

46. *Id.*

47. See generally *id.* at 264 (noting the difficulty in recognizing the high-rate offenders).

48. See *Selective Incapacitation*, *supra* note 43, at 517 (stating that certain researchers had rejected criteria such as prior felony convictions as "poor predictors of an offender's level of criminal activity").

49. Cohen, *supra* note 43, at 261.

50. 111 S. Ct. 2680 (1991).

51. G. David Hackney, *A Trunk Full of Trouble: Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), 27 HARV. C.R.-C.L. L. REV. 262 (1992) (citing *People v. Harmelin*, 440 N.W.2d 75 (1989)).

52. *Id.*

tional by virtue of the Eighth Amendment bar against cruel and unusual punishment.⁵³ The Supreme Court held that the Eighth Amendment would not protect an offender against any criminal punishment except the death penalty, unless it was deemed grossly disproportionate to the crime committed.⁵⁴ By grossly disproportionate the concurring Justices used the case of *Solem v. Helm*⁵⁵ to illustrate,⁵⁶ where the felony involved was the passing of no account checks.⁵⁷ In *Harmelin*, however, the sentence of life imprisonment without parole was not deemed a grossly disproportionate punishment for the crime committed. Thus, a life sentence without possibility of parole was not unconstitutional for the crime of possession of more than 650 grams of cocaine.

In a five to four decision Justices Rehnquist and Scalia reasoned that this length of sentence may be cruel but not unusual, thus there is no proportionality requirement in the Eighth Amendment.⁵⁸ Further, they argued that the length of sentencing is best left up to the Legislature.⁵⁹ Justices Kennedy, O'Connor and Souter concurred in the judgement reasoning that prison terms are a function of the Legislature, that the 8th Amendment does not require a determinate rule for prison sentencing, and that the courts should only get involved when the sentence imposed is irrationally disproportionate to the crime committed.⁶⁰ Thus, in contrast to Scalia, Justice Kennedy did rely on a narrow "proportionality principle,"⁶¹ whereby a sentence will be reviewable only if it is grossly disproportionate to the crime committed.⁶² The case of *Harmelin* did not involve any recidivist laws, but the result reached by the Court bolstered the decision reached in *Rummel v. Estelle*,⁶³ where the Court held that a punishment of life imprisonment with the possibility of parole for three minor felonies did not violate the Eighth Amendment.⁶⁴ It follows that Three Strikes law will have no constitutional problems, because the Court has rarely determined a sentence grossly disproportionate to the crime committed.

II. THE ARGUMENTS FOR AND AGAINST THREE STRIKES LAW

The arguments to follow center on the common purpose of each Three Strikes proposal, which is to incarcerate an individual for life upon a third felonious conviction. The arguments can be grouped into four basic categories of issues: Punishment Theory Issues, Cost Issues, Fairness Issues and Miscellaneous Issues. After the presentation of these arguments an overall analysis will follow. Once the analysis of the arguments is completed, then the current federal Three Strikes proposals can be summarized and compared to a new recommended version of Three Strikes law.

53. See *Harmelin*, 111 S.Ct. at 2686-96.

54. *Id.* at 2686-96, 2702-05 (Kennedy, J., concurring).

55. 463 U.S. 277 (1983).

56. *Harmelin* at 2703-04.

57. *Id.*

58. *Id.* at 2687. Scalia argued that *Solem* should be overruled.

59. *Id.* at 2684-85.

60. *Id.* at 2703-04.

61. *Id.* at 2710.

62. *Id.*

63. 445 U.S. 263 (1980).

64. *Id.* The offender in *Rummel* had been convicted of fraudulent use of a credit card, passing a forged check and acquiring \$120.75 by false pretenses.

A. The Punishment Theory Issues

Anytime an offender is incarcerated the theory of incapacitation plays a role, for that criminal is taken out of society. Even without Three Strikes law the offender would presumably be incarcerated, and this serves as a function of incapacitation. However, the advantage of Three Strikes law is that this same criminal is taken out of society permanently, with no chance to victimize more innocent people.

Our criminal system is geared toward safeguarding the accused so that an innocent person is not falsely convicted, thus it tends to err on the side of innocence rather than guilt. For example, all accused have constitutional rights to counsel,⁶⁵ against self-incrimination⁶⁶ and against improper searches and seizures.⁶⁷ Also, the accused benefits from the Miranda warnings⁶⁸ and ultimately from the high standard of proof beyond a reasonable doubt. These protections ensure that an innocent person is not wrongly convicted; this of course comes at the expense of allowing some guilty to go free. Nonetheless, once someone has been convicted three times under such a protective system the sentencing structure should err on the side of guilt rather than innocence. By erring on the side of guilt it is proposed that career criminals⁶⁹ be kept off the street at the expense of the few that may not commit anymore crimes. Having already afforded criminals their constitutional protections on three previous occasions this should be done for the purpose of making society safer. By virtue of the case of *Harmelin v. Michigan*⁷⁰ there is no constitutional problem with such legislation. Therefore, in the name of a safer society career criminals should be taken off of the streets permanently by Three Strikes law.

A second argument in favor of Three Strikes law proposes that such a harsh penalty (life imprisonment) will deter certain offenders from criminal activity. It has been argued that a more heavy handed punishment doesn't necessarily deter, whereas a higher probability of being apprehended and convicted does deter.⁷¹ However, taking these facts as given it is still safe to assume that some criminals will positively modify their behavior even if most criminals will not. Since the Three Strikes legislation is primarily motivated by the purpose of incapacitation, this deterrent effect on some marginal criminals is simply an added benefit. This is illustrated in the experience that the state of Washington has had with its recent Three Strikes law.⁷² Since November 1993, when the law was approved by referendum, seventeen registered sex offenders

65. U.S. CONST. amend. VI.

66. U.S. CONST. amend. V.

67. U.S. CONST. amend. IV.

68. *Miranda v. Arizona*, 384 U.S. 436 (1966).

69. See generally Dubber, *supra* note 28 (discussing the many names used synonymously with "career criminal").

70. 111 S. Ct. 2680 (1991).

71. Rychlak, *supra* note 28, at 310.

72. WASH. REV. CODE § 9.92.090 (1994). The pertinent text of the Washington state statute is as follows:

Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been four times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in a state correctional facility for life.

have moved out of the state.⁷³ This signifies that criminals are paying attention, and they are modifying their behavior in response. Consequently, Three Strikes law will have a limited deterrent effect on some criminals which is clearly an added benefit considering the primary purpose of the law is to incapacitate.

Opponents of Three Strikes law would take issue with any suggestion that it deters criminals.⁷⁴ To even say that some criminals, such as the Washington state sex offenders, would be deterred from further crime is only speculation. Just because the seventeen offenders moved out of the state does not mean that any who plan on committing further crimes will not do so.

However, the more important question for those who oppose the Three Strikes legislation lies in the overall theory of punishment. They may concede that Three Strikes law serves an incapacitation function, but not that incapacitation by itself justifies incarceration.⁷⁵ Under a theory of retribution society has the right to punish based on the offender's moral culpability in transgressing society's rules.⁷⁶ With Three Strikes law there is no retributive factor other than the tenuous argument that one makes up for deficient punishment of earlier crimes.⁷⁷ Also, no rehabilitative purpose can be attached to the enhanced punishment, because they'll never be free to prove that they have been rehabilitated. Therefore, opponents of the Three Strikes legislation argue that under the theory of punishment the enhanced penalty imposed by Three Strikes law is unjust, for there is no retributive or rehabilitative purpose.⁷⁸

In summary, proponents of the Three Strikes legislation believe that incapacitation alone is sufficient justification for incarceration. The opponents to Three Strikes law argue that some rehabilitative or retributive purpose is necessary for incarceration as punishment. Regarding the deterrent aspect of Three Strikes law, supporters of the law believe that deterrence is, at least, marginally present, while detractors say it is pure speculation.

B. The Cost Issues

Another way to view the Three Strikes legislation, other than as a theory of punishment, is to look at the costs involved should such legislation be implemented. On one side of the ledger it will cost money to house more criminals for longer periods of time.⁷⁹ Also, as prisons become more overcrowded⁸⁰ there is the cost involved with forcing the early release of other criminals who might be just as dangerous, if not more so.⁸¹ On the other side of the ledger there is the cost in lives, injuries, and property losses saved when three-time criminals who otherwise would have been eventually released are incarcerated for life instead.

73. John Carlson, *We've Got 'Three Strikes'—It's Working*, WASH. POST, Mar. 6, 1994, at C7.

74. See STINSON & COWELL, *supra* note 15, at 58-59; Rychlak, *supra* note 28, at 310.

75. See Crocker, *supra* note 28, at 1097-98.

76. See Rychlak, *supra* note 28, at 325.

77. Crocker, *supra* note 28, at 1097-98.

78. See *id.*

79. See David Johnston, *A Parting Shot at the Crime Bill Backed by Clinton*, N.Y. TIMES, Feb. 16, 1994, at A1 (discussing Philip B. Heymann's (former Deputy Attorney General) view that the prospect of more prisoners in jail under Three Strikes law will waste government money); LYNN S. BRANHAM, *THE USE OF INCARCERATION IN THE UNITED STATES: A LOOK AT THE PRESENT AND THE FUTURE* 20-21 (1992).

80. See BRANHAM, *supra* note 79, at 15, 19.

81. See Pringle, *supra* note 12.

Supporters of the Three Strikes legislation base their argument on this latter cost. As an illustration supporters can point to the estimates of time actually served for various crimes. The average length of sentence imposed for murder in 1988 was nineteen years and eleven months, and the estimated time served in prison for these offenders was a mere six years and seven months.⁸² For rape in 1988 the average maximum prison sentence was fifteen years and three months, and the estimated time served was five years and eleven months.⁸³ Finally, for aggravated assaults the average maximum prison sentence in 1988 was seven years and six months, and the estimated actual time served was only two years and eight months.⁸⁴ These numbers show that criminals are getting out much earlier than the maximum sentences allowed, thus creating more chances to cause harm. It is not enough to say that by the time someone commits their third felony and serves their time that they'll be past their crime-producing years. For example, currently, a person convicted of his first rape at age eighteen could be convicted two subsequent times for rape and still be a free man by his mid thirties. This is unacceptable. Such a person needs to be kept away from society; for what value is placed on his fourth rape or fifth or sixth?

This does not even account for the many crimes committed that go unpunished. For instance, it has been estimated that for every arrest made there are four crimes committed without an arrest, and with every conviction for a crime there are nineteen crimes that never end in a conviction.⁸⁵ Proponents of the Three Strikes legislation would argue that this cost far exceeds the cost that Three Strikes law will impose on our burgeoning prison system.

This claim by proponents of the legislation is strengthened further by the fact that the cost of Three Strikes law is minimal compared to the cost of some other programs, such as the mandatory minimum sentencing laws, which are also designed to eliminate crime by incarcerating criminals longer. Such laws have contributed greatly to the manic frenzy of incarceration.⁸⁶ For example, ever since the "war on drugs" commenced and mandatory minimum sentencing became firmly rooted in our legal system, the incarceration rate has increased 110% overall.⁸⁷ Nonetheless, the states that have implemented Three Strikes law over the past two decades have actually shown a less dramatic increase in their rate of incarceration than the states without Three Strikes law.⁸⁸ Thus, Three Strikes law does not have the impact on incarceration rates that certain other programs have. This is not to say that a Three Strikes law

82. BRANHAM, *supra* note 79, at 11. The figures given do not include life sentences imposed.

83. *Id.*

84. *Id.*

85. *Crime's Big Payoff*, U.S. NEWS & WORLD REP., Feb. 9, 1976, at 50 (reviewing FBI estimates on arrests and convictions).

86. See BRANHAM, *supra* note 79, at 18.

87. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1992 609 (1992) [hereinafter JUSTICE STATISTICS] (using the dates 1980-90 the rate of incarceration in state and federal prisons combined rose from 139 per 100,000 to 292 per 100,000).

88. *Id.* The states with a law equivalent to Three Strikes law are Alabama, Colorado, Delaware, Illinois, Louisiana, Maryland, Massachusetts, Nevada, South Carolina, Texas, Vermont, Washington, West Virginia and Wyoming. These states combined had an incarceration rate of 89.39 per 100,000 in 1971 that jumped to 301.93 per 100,000 in 1991. This is an increase of 237%. The states with no similar recidivist law are Arizona, Arkansas, Connecticut, Iowa, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania and Virginia. These states combined had an incarceration rate of 73.23 per 100,000 in 1971 that jumped to 265.01 per 100,000 in 1991. This is an increase of 262%.

will not raise the rate of incarceration, since the longer sentences obviously create increased incarceration over a longer period of time. However, it does show that Three Strikes is a negligible factor when compared to the effect of mandatory minimum sentence laws and the focus on increasing drug-related convictions.⁸⁹

Overall, the monetary cost of Three Strikes law is negligible - only a few thousand more criminals over a twenty-year period⁹⁰ would be held for longer periods of time. Many of these criminals would have returned to crime anyway and been reimprisoned, costing more money going back through the judicial system. Furthermore, the cost involved when increased incarceration for career criminals forces the early release of other dangerous criminals must be answered by mandates that put non-violent offenders in prison for minor offenses rather than Three Strikes law. These mandates include the mandatory minimum sentencing laws and the so-called war on drugs, where reform may be more possible⁹¹ to curtail the dramatic increase in incarceration rates.⁹² Therefore, supporters of the legislation would argue that the monetary costs are far outweighed by the cost in human lives lost, physical injury endured, and property lost or destroyed should Three Strikes legislation be struck down.

When balancing the costs, opponents of Three Strikes law point to the fact that a history of prior convictions does not make one more likely to commit future crimes.⁹³ Thus, without Three Strikes law many prisoners, when finally released, would not revert to their criminal ways. Though a failure to enact the Three Strikes legislation does mean that some criminals will serve their time and return to society to commit further crimes, this number will be reduced by virtue of judicial discretion. Judges who have discretion take into account individual circumstances and will generally make a determination that the maximum penalty be imposed for three-time offenders.⁹⁴ This puts the three-time criminal away for a long time even without Three Strikes law, and, arguably, the older criminal, when released, will be less likely to revert to crime.⁹⁵

Opponents of Three Strikes law can also point to the monetary cost of housing a prisoner for life. Estimates show that after a criminal has reached the age of fifty the total cost of further incarceration is roughly \$600,000 to \$700,000 per prisoner.⁹⁶ With eventually 6,000 or so of these "geriatric"⁹⁷ prisoners under Three Strikes law

89. See generally BRANHAM, *supra* note 79, at 18.

90. See generally Jeanne Cummings, *Senate Swing at Felons is Wider Than Clinton's '3 Strikes' Plan*, ATLANTA J. & CONST., Mar. 2, 1994, at A5 (discussing Deputy Attorney General Jo Ann Harris' estimates of 200-300 criminals potentially being affected by federal Three Strikes law each year).

91. See generally *All Things Considered: Experts Differ on Most Effective Response to Crime* (NPR radio broadcast, Feb. 16, 1994) [hereinafter *All Things Considered*] (discussing Harvard professor Mark Clyman who "contends that the key cause of overcrowding is long, mandatory sentences given to low grade drug offenders").

92. See generally BRANHAM, *supra* note 79, at 18. The tremendous increase of incarceration rates described here by the mandatory minimum sentencing and the increase in drug-related convictions are areas where a much greater opportunity exists to relieve the pressure of the ballooning prison system.

93. See *Selective Incapacitation*, *supra* note 43, at 517.

94. See, e.g., Richard LaCayo, *Lock 'Em Up! . . . ; With outraged Americans saying that crime is their No. 1 concern, politicians are again talking tough. But are they talking sense?*, TIME, Feb. 7, 1994, at 50 (discussing concern over a lack of judicial discretion with Three Strikes law); Lichtblau, *supra* note 12.

95. NEAL SHOVER, *AGING CRIMINALS* 113-17 (1985) (addressing the reasons why aging adults commit fewer crimes compared with their youthful counterparts).

96. Johnston, *supra* note 79. Anthony Lewis, *Abroad at Home: Political Crime*, N.Y. TIMES, Feb. 18, 1994, at A27.

97. See, e.g., Lewis, *supra* note 96 (analogizing Three Strikes law to a "geriatric support ser-

millions of dollars will be wasted. This is an especially compelling argument, since statistics show that the elderly don't commit much crime.⁹⁸ It would be much more efficient to use this money for other more effective crime fighting techniques to offset the cost of the few recidivists who are released. Further, longer sentences for three-timers means that other offenders will be forced out of prison and into society much earlier.⁹⁹ This is a very real cost, because criminals released early will generally be younger than the three-timers and more prone to crime for this reason alone.¹⁰⁰

Also, a Three Strikes law may very easily lead to more accused offenders opting for trial rather than pleading to a predicate offense, for the trial affords the standard of proof beyond a reasonable doubt.¹⁰¹ If this happens the cost to the judicial system will soar.

Finally, it is conceded that the states that have used Three Strikes laws have not shown a rate of incarceration greater than the states without Three Strikes laws. However, this can be explained by other factors such as mandatory minimum sentencing and crack downs on drug offenders. These factors have clouded any real clear analysis of how much effect particular recidivist laws have on the prison rate increase, because of the dramatic increase in incarceration rates they have caused.¹⁰² Further, the fact that most states with a Three Strikes law have only recently enacted such legislation means that the real effects of the legislation will not be seen until these three-timers outlive the release dates they would have had but for the Three Strikes law. Therefore, the opponents of the Three Strikes legislation argue that the costs imposed by such legislation, though difficult to quantify, certainly outweigh the costs created by the few recidivists who may revert to crime.

In sum, proponents of the Three Strikes legislation measure the costs imposed by liberated three-time criminals by looking to the further lives lost and physical injuries to person and property. They posit that these costs are much greater than the monetary costs saved by not enacting a Three Strikes law. Detractors of the Three Strikes legislation see more than monetary costs (although they view monetary costs as being great), for they also believe younger more dangerous criminals inevitably will be released earlier to make room for the three-time "lifers." In the opponent's view all these costs combined outweigh the chance that a few three-timers will revert to crime upon their release.

C. The Fairness Issues

Opponents of the Three Strikes legislation point to a number of potential consequences of Three Strikes law that may be unintended but are, nonetheless, unfair. Under many Three Strikes proposals it is possible that a three-time petty thief could be

vice[s] for the elderly"); Timothy Egan, *A 3-Strike Law Shows It's Not as Simple as It Seems*, N.Y. TIMES, Feb. 15, 1994, at A1 (citing critics who say the law "will create a population of geriatric prisoners").

98. JUSTICE STATISTICS, *supra* note 87, at 424. The statistics show that in 1991, 12.6% of the U.S. population was age 65 and older yet only .7% of arrestees came from this age group. Whereas, 9.1% of the U.S. population was age 19-24 and 25.4% of arrestees came from this age group.

99. BRANHAM, *supra* note 79, at 26. See generally Pringle, *supra* note 12.

100. *Id.*

101. See, e.g., Lichtblau, *supra* note 12 (presenting argument of increased judicial cost as criminals refuse to plea bargain and instead opt for trial by jury).

102. See generally BRANHAM, *supra* note 79, at 18.

sentenced to life in prison.¹⁰³ In fact, it has been shown that recidivist statutes generally tend to prey more heavily on the petty criminal,¹⁰⁴ when it is the serious felon who is the intended mark.

Another example of an unintended effect may be the three-time offender who committed two crimes in his teens and early twenties, then stayed out of trouble until thirty years later, when he was convicted on an assault charge and sentenced to life in prison.¹⁰⁵ This certainly isn't a career criminal, and such a drastic punishment simply is not right. Yet, such an offender could get swept up in the Three Strikes net.

Beyond unfair consequences is the issue of judges being able to retain some discretion over sentencing. Opponents of the Three Strikes legislation would argue that it makes more sense and would result in fairer outcomes if the judge, being close to the particular situation, was allowed to determine sentencing rather than a distant legislature.¹⁰⁶ Three Strikes law takes more discretion away from the judge when, for the sake of fairness, the opposite should be occurring.

Proponents of the Three Strike legislation base their answers to the charges of unfair consequences on the decisions of the Supreme Court.¹⁰⁷ Unless the punishment is grossly disproportionate to the crime, the length of sentence will not be an issue.¹⁰⁸ Thus, supporters of Three Strikes law can agree with opponents as to the issue of unfair sentencing for petty criminals, when the sentence is grossly disproportionate to the crime. Regarding the final fairness issue of judicial discretion, supporters simply argue that in the case of a criminal with three convictions, there should be no need for discretion. Three-timers should be kept from society permanently.

Therefore, looking at the issue of fairness, opponents of the Three Strikes legislation argue that there are too many unintended and unfair consequences to Three Strikes law. Also, they point to the fact that judicial discretion is unduly limited. Proponents can agree that grossly disproportionate sentencing is unfair, since the Supreme Court has effectively ruled this way.¹⁰⁹ However, they also argue that judicial discretion is unnecessary in Three Strikes cases.

D. The Miscellaneous Issues

Detractors of the Three Strikes legislation offer two further arguments based on unintended side effects of Three Strikes law which do not fit into any previous categories. The first argument is that Three Strikes law creates a "nothing-to-lose attitude"¹¹⁰ in a two-time felon. For instance, a criminal is more likely to kill witnesses, if he will get life imprisonment anyway should he be caught and convicted. Also, if

103. See, e.g., Pringle, *supra* note 12 (presenting George Washington University Professor of Law Jonathon Turley who is quoted as saying that a primary reason more jurisdictions have not implemented Three Strikes is the unfair effect on the petty criminal). See Dubber, *supra* note 28, at 199-200.

104. Dubber, *supra* note 28, at 199-200.

105. See, e.g., Ana Puga, *Crime Specialists Fault 3-Strike Rule; They dismiss life terms for violent repeat offenders as mostly empty rhetoric*, BOSTON GLOBE, Jan. 27, 1994, at 14.

106. See LaCayo, *supra* note 94.

107. See *supra* notes 50, 54-64 and accompanying text.

108. See *supra* notes 50, 54-64 and accompanying text.

109. See *supra* notes 50, 54-64 and accompanying text.

110. See, e.g., Robert Gulack, *Where Three Strikes Plan Takes Us in 20 Years; Encouraging Murder*, N.Y. TIMES, Feb. 7, 1994, at A16 (proposing argument that law creates a "might as well be hanged for a sheep as a lamb" mentality); Egan, *supra* note 97, at A1 (stating that some police and prosecutors have experienced this nothing-to-lose attitude).

cornered by police such a criminal has a greater incentive to fight the police, creating more danger for the officers and innocent passersby. It may have been for just such a problem that the death penalty for kidnapping was abolished.

It is also argued by opponents that Three Strikes law will create the possibility of a new plea-bargaining scheme, whereby crimes are pled out specifically as "non-violent" to circumvent the Three Strikes law.¹¹¹ Thus, it is possible that over time many of the offenders for which the law has been designed will simply evade it through pleading to a non-violent offense.

Supporters of the law would argue that these side effects are purely speculative and have not become a problem in any states currently using Three Strikes laws. Further, proponents of the Three Strikes legislation can point to the vast majority of citizens that are in support of it.¹¹² While public support does not necessarily make an issue right, it does illustrate the "common sense" factor. Despite the fact that nine out of ten news stories randomly selected concerning this issue tend to cast a negative spin on the Three Strikes legislation,¹¹³ the citizens of the U.S. are in favor of it. This is not because the general public is stupid or ignorant or vindictive, rather it is because it makes sense. Few will argue that rehabilitative efforts, education and similar programs are not valuable tools (if not the most valuable tools) to turn someone around or curb crime before it starts. Nevertheless, a line has to be drawn somewhere and society is drawing that line with Three Strikes. Some may argue that reliance on common sense can be deceiving, but after three felonious offenses and three chances for reform (the first chance coming before the first felony conviction) eighty percent of the country is not deceived when they say they want these criminals locked up permanently.¹¹⁴

Thus, opponents argue that the nothing-to-lose attitude and the change in pleading will be negative effects of Three Strikes law. However, supporters of the law point to a lack of any serious problem in the states currently employing such laws. Further, they rely on the fact that the considerable majority of American citizens favor Three Strikes law.¹¹⁵

E. Analysis of the Three Strikes Arguments

The arguments for both sides are quite compelling. However, the *very* fact that Three Strikes law is a *limited* crime-fighting tool,¹¹⁶ make the arguments supporting it more compelling. The punishment theory arguments establish that as a practical matter incapacitation is furthered by Three Strikes law. Although, philosophically, this may be argued as unjustified without retribution or rehabilitation, pragmatically, the issue of safety justifies incapacitation as the sole purpose of Three Strikes law regardless of whether any deterrent effect is present. Aside from this, the arguments concerning the costs involved with this legislation constitute the heart of the debate on its efficacy. It is here that the limited nature of Three Strikes law is an advantage to supporters of the law.

111. Puga, *supra* note 105, at 14.

112. See, e.g., Lichtblau, *supra* note 12, at 1; Pringle, *supra* note 12, at 14.

113. Researching this note, of fifty-five articles read only five were favorable to Three Strikes law.

114. See generally Lichtblau, *supra* note 12, at 1; Pringle, *supra* note 12, at 14.

115. See Lichtblau, *supra* note 12, at 1; Pringle, *supra* note 12, at 14.

116. See H.R. 2872, 103d Cong., 1st Sess. (1993). This unenacted crime bill spans 355 pages (not including the text from the statutes it amends) and the Three Strikes portion is less than one full page of text.

It has been estimated that the new Three Strikes law in the state of Washington will affect roughly seventy criminals per year,¹¹⁷ that a similar law in New York would affect 300 per year¹¹⁸ and that a federal Three Strikes law would affect 200 to 300 criminals yearly.¹¹⁹ These are not the large numbers one might think of when one hears all the rhetoric surrounding this issue. Nonetheless, it is the small numbers that tip the balance in favor of enacting such legislation. All the costs that opponents to the legislation decry fade into relative obscurity when the numbers are crunched. For example, supposing that 6,000¹²⁰ prisoners are added to the federal system over the next twenty years; this represents only a ten percent increase over the same twenty years.¹²¹ Considering the federal prison population grew by 100% in only an eight-year period from 1983 to 1991,¹²² this ten percent increase over twenty years is relatively minor. However, remembering the fact guiding this legislation, that a small number of criminals inflict a disproportionate share of the crime on society, the costs that can be inflicted by just a handful of dangerous criminals in each jurisdiction can be very great. For illustration, look to the recent use of the Three Strikes law in the state of Washington. So far, there have been eight criminals who, if convicted, fall under the purview of Three Strikes law.¹²³ One offender is a murderer and sex criminal, two others have attempted murder and are sex offenders, one is a four-time armed bank robber and the four remaining street criminals have twenty felony convictions and forty-four misdemeanor convictions between them.¹²⁴ Though they be only eight men, they certainly have inflicted great damage on society.

The non-monetary costs of younger more dangerous criminals being released from prison early to make room for newer prisoners is recognized by both the supporters and detractors of the Three Strikes legislation. The answer to this problem lies in reform to the mandatory sentencing guidelines and/or the reconsideration of the priority given to incarceration of minor drug offenders. These two issues most strongly account for the burgeoning prison system, and Three Strikes law will have little relative impact.¹²⁵

The fairness and other incidental concerns offered by opponents to the legislation lack serious merit due to the relatively limited nature of Three Strikes law. The fact that some petty criminals may fall under the cloak of Three Strikes law is answered quite competently by the Supreme Court, where a grossly disproportionate sentence will get reviewed.¹²⁶ However, the limited nature of the legislation assures that this will be a rare circumstance. Further, the worry that judicial discretion is hampered is minor considering the few cases that will arise. Also, concern that criminals will develop a nothing-to-lose attitude is hard to take seriously when it has not become a prob-

117. See, e.g., Egan, *supra* note 97, at 1; LaCayo, *supra* note 94, at 50.

118. See, e.g., Egan, *supra* note 97, at 1; LaCayo, *supra* note 94, at 50.

119. See, e.g., Cummings, *supra* note 90, at A5.

120. Take the higher of the estimated 200-300 criminals per year affected by federal Three Strikes law and multiply this by twenty years.

121. JUSTICE STATISTICS, *supra* note 87, at 615. The total inmate population in federal institutions for 1991 was 63,930.

122. JUSTICE STATISTICS, *supra* note 87. From 1983 to 1991 the rate of incarceration for federal inmates increased from 11 per 100,000 to 22 per 100,000.

123. Carlson, *supra* note 73, at C7.

124. Carlson, *supra* note 73, at C7.

125. See BRANHAM, *supra* note 79, at 18; *All Things Considered*, *supra* note 91.

126. See *supra* notes 50, 54-64 and accompanying text.

lem in states currently using Three Strikes law. Finally, the fear of a changed pleading system is simply unfounded considering the small number of cases that will apply.

Therefore, Three Strikes law in some form is a valid and worthwhile endeavor, albeit limited in scope. The next consideration is what form the particular Three Strikes law should take. The current federal Three Strikes proposals have a number of obvious distinctions, and by examining these an improved version of Three Strikes law may be advanced.

III. THE CURRENT THREE STRIKES PROPOSALS

The proposed Three Strikes legislation at the time of this writing consisted of four distinct recommendations. The first two proposals were provided in a Senate-passed bill currently under House examination,¹²⁷ the third proposal was included in a House bill currently under consideration¹²⁸ and the final proposal was that offered by the President. All four share the common theme of life imprisonment upon a third felonious conviction. Nevertheless, differences emerge when one looks to the type of conviction necessary to trigger life imprisonment. Also, there are questions whether the previous two convictions need to be two distinct consecutive convictions with separate time served, or whether the two previous convictions can be part of the same crime spree. Finally, there is a question whether parole is a possibility under various versions of the legislation. These differences become apparent with a closer look at each proposition.

The first Three Strikes provision is located in the Senate-passed bill (currently H.R. 3355) and appears under Title XXIV as section 2408.¹²⁹ This section extends the Three Strikes statute already in effect for persons convicted of a third felonious drug offense¹³⁰ to include violent felonies. Thus, any felonious drug or violent crime conviction after two or more previous convictions lands the offender in prison for life without the possibility of parole. Here, a violent felony includes any felony with a maximum punishment equal to or greater than ten years which involves an element of violence or threatened violence to person or property.

The second Three Strikes provision included in the same Senate-passed bill (cur-

127. H.R. 3355, 103d Cong., 1st Sess. §§ 2408, 5111 (1993).

128. H.R. 2872, 103d Cong., 1st Sess. § 712 (1993).

129. H.R. 3355, 103d Cong., 1st Sess. § 2408 (1993). The title is "Life Imprisonment Without Release For Drug Felons And Violent Criminals Convicted A Third Time" and the text is as follows:

Section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A) is amended by striking "If any person commits a violation of this subparagraph or of section 418, 419, or 420 after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence." and inserting "If any person commits a violation of this subparagraph or of section 418, 419, or 420 (21 U.S.C. 859, 860, and 861) or a crime of violence after two or more prior convictions for a felony drug offense or crime of violence or for any combination thereof have become final, such person shall be sentenced to not less than a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term 'crime of violence' means an offense that is a felony punishable by a maximum term of imprisonment of 10 years or more and has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

130. See 21 U.S.C. § 841 (1993).

rently H.R. 3355) appears under Title LI as section 5111.¹³¹ This section provides for life imprisonment upon a third violent felony conviction. Here, drug offenses are not included and the violent crime is defined less stringently than section 2408 as any felony with a maximum punishment equal to or greater than five years which involves an element of violence or threatened violence to person or property. Also, this section omits the words "without release" after the words "life imprisonment" opening up the argument that parole is possible.

The third Three Strikes proposal is the measure provided for in the pending House bill H.R. 2872 under Title 7, Subtitle B, Section 712.¹³² This Three Strikes proposition is similar to the second proposal in the Senate approved bill except for one major difference. Here, the necessary violent crime only has to be punishable by a maximum imprisonment of greater than one year as opposed to five years. Like its counterpart, however, there is no language expressly indicating that parole is not an option.

The fourth and final Three Strikes proposal is President Clinton's own version.¹³³ The President's version enumerates the specific crimes necessary to trigger the life imprisonment sentence as opposed to defining the type of felony category

131. H.R. 3355, 103d Cong., 1st Sess. § 5111 (1993). The title is "Mandatory Life Imprisonment Of Persons Convicted Of A Third Violent Felony" and the text is as follows:

Section 3581 of Title 18, United States Code, is amended by adding at the end the following new subsection:

(c) IMPRISONMENT OF CERTAIN VIOLENT FELONS—

(1) DEFINITION— In this section, 'violent felony' means a crime of violence (as defined in section 16) under Federal or State law that—

(A) involves the threatened use, use, or risk of use of physical force against the person of another;

(B) is punishable by a maximum term of 5 years or more; and

(C) is not designated as a misdemeanor by the law that defines the offense.

(2) MANDATORY LIFE IMPRISONMENT— Notwithstanding any other provision of this title or any other law, in the case of a conviction for a Federal violent felony, the court shall sentence the defendant to prison for life if the defendant has been convicted of a violent felony on 2 or more prior occasions.

(3) RULE OF CONSTRUCTION— This subsection shall not be construed to preclude imposition of the death penalty.

132. H.R. 2872, 103d Cong., 1st Sess. § 712 (1993). The title is "Life Imprisonment Or Death Penalty For Third Federal Violent Felony Conviction" and the text is as follows:

Section 3581 of Title 18, United States Code, is amended by adding at the end the following:

(C) Punishment Of Certain Violent Felons -

(1) GENERAL RULE - Notwithstanding any other provision of this title or any other law, in the case of a conviction for a Federal violent felony, the court shall sentence the defendant to prison for life if the defendant has previously been convicted of two other violent felonies and if a death results from the violent felony, the defendant shall be subject to the death penalty.

(2) DEFINITION - As used in this section the term "violent felony" is a State or Federal crime of violence (as defined in section 16 of this title)-

(A) that involves the threatened use, use, or the risk of use of physical force against the person of another;

(B) for which the maximum authorized imprisonment exceeds one year; and

(C) which is not designated a misdemeanor by the law that defines the offense.

(3) RULE OF CONSTRUCTION - This subsection shall not be construed to prevent the imposition of the death penalty.

133. Cummings, *supra* note 90 (offering President's plan as presented by Deputy Attorney General Jo Ann Harris).

necessary. The list of crimes triggering the statute would be murder, assault with intent to murder or rape, aggravated sexual assault, the use of guns during drug deals, and kidnapping. The President's proposal also mandates that there is no possibility for parole, and it provides that the three violent crimes necessary occur in sequence and not as part of a single crime spree.

It is clear from these four proposals that Three Strikes legislation is not as straightforward as the rhetoric makes it sound. The issues of what type of felony to include, how the previous convictions are counted and whether parole should be added all must be considered in developing a recommended version of Three Strikes law.

IV. A NEW THREE STRIKES PROPOSAL

To develop the optimal Three Strikes law it is first necessary to establish the type of criminal that will be the focus of the law. The President focused on extremely violent offenders in his version, while the other proposals focused on more broadly defined offenders.¹³⁴ The recent Washington State Three Strikes law is a good example, where both violent criminals and lesser chronic victimizers are ensnared in the law.¹³⁵ Yet, the Washington law is still only estimated to apply to seventy criminals per year.¹³⁶ This shows that the law is not being applied too broadly. On the other hand, a law based on the President's proposal would be too narrow. For instance, only two of the eight felons for which the law applies in Washington would be held accountable under the President's enumerated version.¹³⁷ To remain applicable to a practical number of criminals it would be prudent to recommend a version of Three Strikes law similar to Washington's in this respect. Thus, the crimes triggering the Three Strikes penalty should be any violent felony with a punishment greater than one year; where violent felony means the use or attempted use of violence to person or property during the commission of the crime. This is similar to what is proposed in the House version of Three Strikes law, and it is similar to the State of Washington's in that it applies to relatively low grade felonies.

Regarding the question of how the previous convictions should be counted, one could look to the arguments posited by Derrick Crago in his Note "The Problem of Counting to Three Under the Armed Career Criminal Act."¹³⁸ While analyzing the Armed Career Criminal Act,¹³⁹ Crago labeled two different approaches that courts took toward this problem as the "criminal episodes approach" and the "intervening convictions approach."¹⁴⁰ Under the criminal episodes approach the previous convictions need only be based on "distinct criminal episodes regardless of intervening adjudication."¹⁴¹ Whereas, the intervening convictions approach requires consecutive convictions in different proceedings with full incarceration in between.¹⁴² The courts often used the criminal episodes approach,¹⁴³ but to truly get at a recidivist criminal the

134. See *supra* notes 129, 131-133.

135. See *supra* note 72.

136. See, e.g., Egan, *supra* note 97; LaCayo, *supra* note 94.

137. Carlson, *supra* note 73.

138. Derrick D. Crago, Note, *The Problem of Counting to Three Under The Armed Career Criminal Act*, 41 CASE W. RES. L. REV. 1179 (1991).

139. 18 U.S.C. § 924 (1988).

140. Crago, *supra* note 138, at 1181-82.

141. *Id.*

142. *Id.*

143. *Id.*

intervening convictions approach is more sensible.¹⁴⁴ The whole idea of the law is that the criminal has had two previous chances to reform before the third conviction. Thus, another requirement of the new Three Strikes proposal is to articulate an intervening convictions approach.

The final factor raised is the question of parole. Those who don't favor offering parole as an option in Three Strikes law state that the message of the law is more powerful if there is no parole offered.¹⁴⁵ This type of thinking relies more on the deterrent effect of the law. However, deterrence is not really a primary factor of the law, as stated earlier; incapacitation is the focus.¹⁴⁶ It is more judicious to look at the fact that elderly criminals are much less likely to commit further crimes, yet we will still pay for their geriatric incarceration.¹⁴⁷ This fact was offered as an argument against Three Strikes law generally.¹⁴⁸ Though it does not persuade for that purpose, it is persuasive in the argument for offering the option of parole once a criminal reaches the latter stages of his life.¹⁴⁹ Once a criminal is past the age where further crime is of no concern, then parole should be considered to offset the further costs of that criminal's incarceration. Thus, parole will be an option once a criminal reaches roughly the age of sixty in the recommended version of Three Strikes law.

With the three foregoing concerns addressed a recommended version of Three Strikes law can be offered based on the structure of the House version.¹⁵⁰

(1) General Rule— Notwithstanding any other law, in the case of a violent felony, if the defendant has previously been convicted of two other violent felonies with incarceration for the first conviction having been fulfilled previous to the second conviction, the court shall sentence the defendant to prison for life with possibility for release only after thirty years served.

(2) Definition— As used in this section the term "violent felony" is any state or federal crime of violence:

(a) that involves the threatened use, use, or risk of use of physical force against the person or property of another; and

(b) for which the maximum authorized imprisonment exceeds one year.

Of the four proposals for federal Three Strikes law this recommended version most closely resembles the House version.¹⁵¹ The House version offered the broadest class of predicate offenses of the four federal proposals. The new version expands this even further by including threat to property as well as threat to person. Precise language is employed in the recommended version articulating how the previous felony convictions are to be counted. None of the four federal versions does this satisfactorily. Finally, a clear opportunity for parole is presented, whereas the House and the second Senate version are vague on this point and the other two versions deny parole.

144. *Id.* at 1206.

145. See, e.g., *A Less Bad Three-Strikes Bill*, N.Y. TIMES, Mar. 3, 1994, at A20 (discussing the various Three Strikes proposals, Deputy Attorney General Jo Ann Harris is quoted as saying that the life term with no parole "sends a clearer and more effective message").

146. See *supra* part I.B.2-3.

147. See *supra* notes 97-98 and accompanying text.

148. See *supra* p. 27.

149. See *supra* note 98 and accompanying text.

150. H.R. 2872, *supra* note 132.

151. See H.R. 2872, *supra* note 132.

V. CONCLUSION

The premise that a smaller percentage of criminals commit a larger percentage of the crime underlies the Three Strikes legislation. This legislation is supported by the theory of incapacitation as punishment, a punishment which the Supreme Court has held is constitutional. The fact that it is limited in scope combats arguments against the supposed costs of the law, and it is a poignant reminder that the Three Strikes law is only a small weapon in the crime-fighting arsenal. It is proposed that the four federal versions of Three Strikes legislation find common ground in the new recommended version presented here. This newly-submitted version of Three Strikes law incarcerates based on physically violent felonies punishable by one year in prison which is a useful standard of criminality. Further, it guarantees that the previous two convictions occur separately and with intervening adjudication, and that parole be an option when the offender is most likely to be beyond the age of engaging in any more criminal activity.

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